NO. 90-287

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1990

J. REED DUNKLEY and GRACE DUNKLEY,
husband and wife,

Petitioners,

v.

REGA PROPERTIES, LTD., et al.

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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This reply brief is being presented pursuant to Rule 15.6 of the Rules of the Supreme Court, to address two issues raised in the brief in opposition to the petition for writ of certiorari to the Ninth Circuit.

Respondent raises two questions for review. In the first question, respondent asks whether the Supreme Court has authority to review what respondent terms an interlocutory order. In the second question, respondent asks whether the Supreme Court has authority to consider a question not squarely placed before the lower court.

The answers are detailed below. In brief, the answers are:

1. The United States Supreme Court has authority to review a case such as this, even if part of it has been termed inter-

locutory by the Ninth Circuit.

2. The issue of jurisdiction was raised below in the first hearing held on the motion to dismiss, and subsequently ignored by each judicial officer.

CERTIORARI

28 U.S.C. 1254, the statute relied upon by petitioner to seek certiorari, grants the United States Supreme Court power to review any case it deems appropriate. This certiorari power is very broad and there is no technical finality requirement involved. Nevertheless, the decisions of the Bankruptcy Court, District Court, and Court of Appeals were final and appealable.

The Supreme Court's power of certiorari is considerably broad. The Court may review virtually any case it chooses. While most cases arise after adjudication

in the Courts of Appeals, certiorari power is so broad that it may interrupt lower court proceedings, [1] or even pre-empt them. [2]

The power to review interlocutory rulings of lower courts can be derived from the general provisions of the certiorari statute and the all writs act. See Davis v. Jacobs, 454 U.S. 911, 102 S.Ct. 417, 70 L.ed.2d 226 (1981).

There is, therefore, no finality requirement which must be met prior to petitioning for a Writ of Certiorari. The certiorari power has expanded to the point of eliminating that requirement altogether when the decision for which

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[1]. See Forsyth v. City of Hammond, 166 U.S. 506, 17 S.Ct. 665 (1897).

[2]. See U. S. v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974).

review is requested is from a lower federal court. The Supreme Court has jurisdiction to issue a writ of certiorari without a finality requirement. Indeed, Certiorari has been granted to review non-final dispositions without any further explanation. See, e.g., INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1210, 94 L.Ed.2d 434 (1987). Certiorari has even been granted over objection that the case was not ready for review. See Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

At any rate, Certiorari is proper in this case because, first, the decisions in the lower federal were final and appealable, and, second, the issue raised in the Petition for Certiorari is the jurisdiction of the Bankruptcy Court to grant relief.

The decision by the Bankruptcy Court to deny a motion to dismiss is final and properly appealable under these facts because (1) the Bankruptcy Court immediately granted affirmative relief to the debtor, which caused serious and irreparable harm to the Dunkleys, and (2) the District Court and the Ninth Circuit affirmed the relief granted to the debtor. Far from being an interesting intellectual argument to the Dunkleys, and far from being merely an interlocutory decision, the refusal to dismiss the debtor or to appoint a trustee to bring in the Canadian assets effectively eliminated the Dunkley's interest in the property. Under either of two tests developed by the Ninth Circuit, the case is final. Under the test developed in In re Mason, 709 F.2d 1313, 1316 (9th Cir. 1983), an

interlocutory order is reviewable if it "may determine and seriously affect substantive rights" and "cause irreparable harm to the losing party if he had to wait to the end of the bankruptcy case." How much more seriously can property rights be affected than to say that they no longer exist? How much more damage can accrue than to be told that your own government is going to sacrifice your property rights so a Canadian firm can reorganize its Canadian assets?

The same result occurs when the "need-for-immediate-review" test from In re Brissette, 561 F.2d 779 (9th. Cir. 1977), is applied. In this test, the Court of Appeals decided that immediate review can be granted when an exemption becomes "the final resolution of the rights of the parties for practical pur-

poses." In re Brissette, 561 F.2d 779, 782 (9th. Cir. 1977). The Court of Appeals affirmed a measure of damages used by the Bankruptcy Court to assess the damages caused to the Dunkleys. Applying practical reason to the problem, the decision was final, even if the decision also included an appeal from a denial of a motion to appoint a trustee.

JURISDICTION

The Court also has the power to grant review in this case because the jurisdiction of the lower court to proceed is the issue in question. Mansfield, Colwater and Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.ed. 462 (1884).

Although the issue of jurisdiction of the lower court to proceed can be raised at any time, Mansfield, Colwater

and Lake Michigan Ry. Co. v. Swan, supra, the issue was raised early on in the proceedings. On March 18th, 1986, the issue was placed squarely before the Honorable John M. Klobucher, a judge in the Bankruptcy Court:

> THE COURT: Is it your position, Mr. McKanna, that the liability to the creditors in this proceeding is limited to the assets that are in the Court's jurisdiction?
>
> MR. MCKANNA: It's my understanding, Your Honor, that the liability to the creditors--first of all, it was my position in the research that I did that the jurisdictional aspect of the Court was with the property and the assets that are before the Court in the United States. It was not my feeling from the material that I obtained that this Court could administer the property in Canada.
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> ...
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> MR. HERMAN: The case law that we found, Your Honor, all says that all means all and wherever situated means wherever situated. Canadian bankruptcy law says the same thing, interestingly enough. I can't find a case anyplace that stands for the

> proposition that you can bifurcate a corporation and hav bankruptcy in different jurisdictions, cut it up however to suit you. (CP 136, pages 2-4).

Thus, it is clear that the issue of jurisdiction had at one time been raised. The Bankruptcy Court felt it had no jurisdiction over the assets in Canada, so it simply administered the assets in the United States, leaving substantial assets in the hands of the debtor. That is not how a bankruptcy is supposed to work, and calls for dismissal on either jurisdictional or bad faith grounds.

CONCLUSION

The power of the Courts is to do what is right. The United States Supreme Court is vested with the power to take control of this case and decide whether the Bankruptcy Court had the authority to proceed as it did.

RESPECTFULLY SUBMITTED this 28th day of September, 1990.

KEYES AND SCHRAWYER
by:

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